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No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, PETITIONER

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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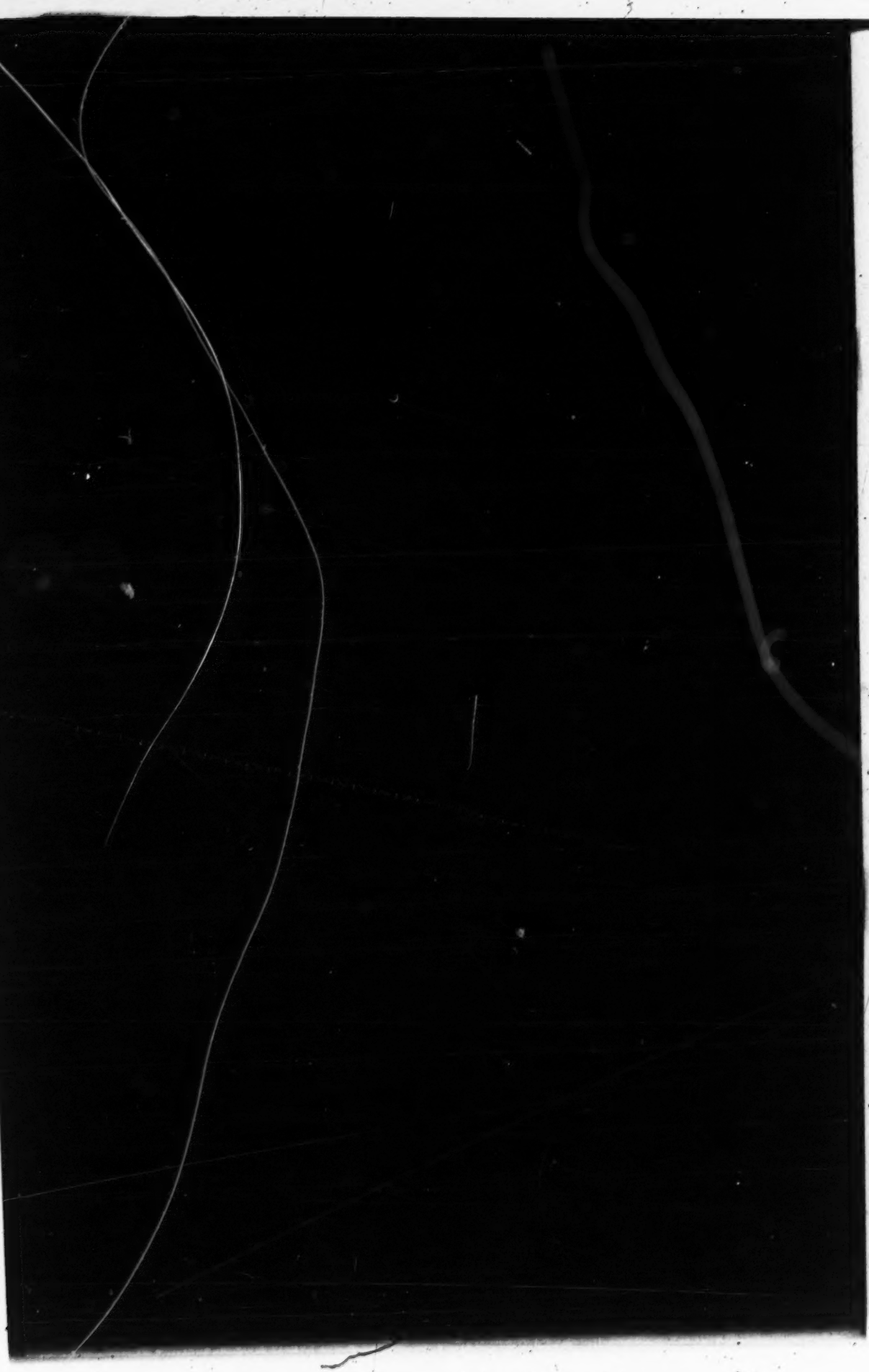

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1286

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REPLY BRIEF FOR THE UNITED STATES

1. Respondents assert that this case is not of public importance because changes in the structure of the antibiotics industry and settlements they have made of private antitrust suits have dissipated any significance the case may once have had. But the purpose of a criminal prosecution such as this is to punish law violators, in order to deter commercial conduct destructive of the competitive system on which the public depends for protection against economic abuse. Changes in the industry and substantial payments made in settlement of private litigation, although perhaps relevant in determining the need for equitable

422-855—71

relief in a civil suit, are irrelevant in determining the need for further review of the reversal of convictions in a major criminal antitrust case.

2. Respondents' stress upon the court of appeals' reference to other, undisclosed errors and to the fact that this case is being remanded for retrial only emphasizes the need for review now. The remand for a new trial without indicating what other errors have influenced the appellate court's thinking, leaves the district court without guidance, and risks a needless expenditure of time and energy of the district court, the prosecution and the defendants themselves.

3. We have shown (Pet., pp. 16–21) that the trial court's charge properly treated the evidence pertaining to similarities and differences between the conduct of the defendants and their co-conspirators and of Parke, Davis, which was not named as a conspirator. Respondents make no attempt to answer the point in the petition that defense counsel's failure to discuss at length the similarity between the conduct of Parke, Davis and of their clients resulted not from any limitation imposed by the trial court, but from counsel's own decisions as to the best trial strategy.

The trial court properly refused to give defendants' proposed charge on the role of Parke, Davis because it was one-sided, mentioning the similarities but ignoring the many differences between the conduct of defendants and Parke, Davis (4711a–4712a). Moreover, contrary to their present assertion (Br. in Opp., pp. 16–17), counsel understood that they were free (a) to argue that the government did not claim that Parke, Davis

was in the conspiracy (4647a), and (b) to stress the similarities between the defendants' and Parke, Davis' actions, subject to the government's right to emphasize the differences (4646a).

4. Contrary to respondents' contention (Br. in Opp., p. 18) the trial court did not "exclude" evidence of their costs which might have refuted the government's contention that their prices were unreasonably high. Rather it required that such evidence, proffered as special cost studies, be presented by a qualified witness at an appropriate time, after opportunity for the government to examine the data (see, *e.g.*, 1708a, 1849a, 1989a). That this was clear is shown by the fact that defense counsel expressly admitted their understanding that nothing was being permanently excluded (1687a–1688a). Indeed, special cost studies relating to a co-conspirator, Squibb (Pfizer X 602–605), admission of which had initially been postponed (2238a–2241a), were received in evidence without objection 4426a–4428a). Since respondents had the same opportunity to introduce relevant data, failure to produce their own cost studies reflected a strategic choice, not any exclusionary ruling by the court (see 4564a).

4. Contrary to respondents' assertions (Br. in Opp., p. 22) and the implications in the court of appeals' initial opinion (Pet. App., pp. 16a–17a), the charge to the jury did not characterize all the testimony of defendants' officials as "assertions of innocence" or broad denials of the illegal agreements alleged in the indictment. As the trial judge noted in his post-trial opinion (281 F. Supp. 837, 848), the testimony of defendants' officials was of two kinds: (1) business

explanations for the inter-company agreements and other actions which the government claimed reflected, when taken as a whole, the conspiracy to restrain trade alleged in the indictment; and (2) negative answers to questions, tracking the indictment's allegations, as to whether they had acted illegally (*e.g.*, 2734a–2735a). In order to remind the jury of the testimony setting forth the business explanations, the "instructions contained repeated reminders that the actions taken by the defendants were entirely lawful if taken independently; that the jury was to consider whether the evidence reflected only normal, independent, self-interested, and lawful business conduct, or unlawful conspiratorial action; and that the essential and pervasive question was whether the government's charge of conspiracy had been proved [references omitted]." 281 F. Supp. at 848. The charge stated that "In weighing the significance and meaning of the meetings in this case, you will consider the extent to which you heard legitimate business purposes for them * * *" (Pet. App., p. 107a). But that left the question of how the jury should be guided in appraising the officers' "assertions of innocence." The trial court's separate treatment of this "denial of wrong doing" testimony (Pet. App., p. 108a) was, as we show in the petition, entirely proper. Respondents' argument (Br. in Opp., p. 23) based on the interval between their officials' testimony and the charge overlooks the summations, which furnished defendants a full opportunity—which they used—to summarize for the jury the "explanatory" testimony, as well as the "denials."

5. Respondents stress a portion of the colloquy on exceptions to the charge to support the ruling below (Pet. App., pp. 28a–29a) that the instruction dealing with the licenses Pfizer granted, at Bristol's request, to Upjohn and Squibb (Pet. App., pp. 94a–95a), was prejudicially erroneous insofar as it stated that the licenses themselves barred Squibb and Upjohn from manufacturing, when, in fact, the bar was due to Pfizer's patent. The full text of the colloquy (5019a–5020a) shows, however, that respondents' objection to the charge was on a different ground: the claim that the licenses in fact granted the right to manufacture to Squibb and Upjohn because of a legally implied right to do so if they could not obtain tetracycline from a non-infringing source. They never excepted on the ground relied on by the court of appeals. Thus, defendants did not believe when the charge was given that it might mislead the jury into concluding that the licenses to Squibb and Upjohn, or the Pfizer-Bristol agreement to issue them "impos[ed] restrictions which otherwise did not exist" (Pet. App., pp. 28a–29a).

Because the indictment alleged (¶ 46(i)) that "Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline Products," the court had to explain the significance of this allegation as it bore on the ultimate question of whether there was a conspiracy. Contrary to respondent's contentions, the court's charge on this point (Pet. App., pp. 94a–95a) never stated that the licenses themselves prohibited manufacture. The court had earlier explained the dif-

ference between unilateral and consenual limitations on patent licenses,[1] and stated that "the government does not claim that any of the license agreements involved in this case or indeed any of the written agreements in this case is in itself unlawful or in combination with any of the others, without reference to other facts. Accordingly, you may not infer an antitrust violation merely from the existence of such agreements or from any of the terms contained within them" (Pet. App., p. 71a). The charge explained to the jury, in clear and neutral terms, that the licenses to Squibb and Upjohn were "limited" or "restricted" in the sense used throughout the trial, namely, that they did not include all rights held by the patentee (*i.e.*, they did not grant the right to manufacture.)[2]

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[1] "* * * it is important to remember in this case that a patent confers a lawful monopoly upon the inventor or assignee of the inventor of a useful product. In the absence of a conspiracy with others, the holder of such a patent monopoly may keep and enjoy it for himself, or may license or refuse to license it as he sees fit" (Pet. App., p. 64a).

"The holder of patent rights has * * * a form of lawful monopoly and freedom to exclude others from sharing it. But the patent laws as I have told you, do not authorize him to agree with his licensee that he will exclude or restrict others by refusal or limiting grants under his patent to such other or third parties" (Pet. App., pp. 71a).

[2] For example, Bristol's counsel, referring to the Squibb-Upjohn licenses, asked the jury to "Keep in mind you will hear that referred to as a *limited* license or a *restricted* license. That term is used in the sense that the license was not as broad as it might have been, but the license did not limit Squibb and Upjohn with respect to tetracycline bought from Bristol" (4740a–4741a; emphasis added). Moreover, Bristol itself had written, when it undertook to obtain licenses for Squibb and Upjohn, that they

6. Bristol is alleged to have joined the conspiracy in December 1955. The record refutes respondents' claim (Br. in Opp., p. 29) that the trial judge "conceded" that his charge might have misled the jury into concluding that Bristol could be found guilty for conduct prior to that date. The pertinent portion of the court's explanation for that part of the charge is as follows (5096a–5097a):

> THE COURT: There is something in your papers, Mr. McDonald, and I might as well state my position now on a transcript so that it will be perfectly clear about the possibly misleading impact of that part of the charge, and I think the legislative history of that ought to be perfectly well understood on all sides and on all levels, i.e., at the outset of the trial the defendants raised an issue as to the question of the continuing character of the conspiracy as it related to the problem of the statute of limitations [1298a–1299a], and based upon the opposed submissions that were given at that time, I told the jury at the outset to be on the qui vive for chronology because they were going to have a statute of limitations problem [1469a–1470a].
>
> At the very end of the trial, when we discussed the charge and I pointed out to both

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"may, however, be *limited* to your right to purchase, use and sell tetracycline to the drug trade * * * GX 83, 8645a; GX 108, 8703a; emphasis added). Bristol's settlement on its behalf and on behalf of Squibb and Upjohn of the infringement litigation between them and Pfizer resulted in the grant of licenses to each of the alleged infringers at the same royalty: Bristol received an unlimited license, including the right of manufacture but the Squibb and Upjohn licenses did not include this right.

sides what it seemed to me appropriate to say about the problem of continuing conspiracies and the burden of affirmatively showing withdrawal once entry has been shown, the defendants, for perfectly understandable reasons, decided that they didn't want to put to the jury any question of the statute of limitations, and so we abbreviated that part of the charge [4628a, 4653a–4655a]. But in that connection I told the jury still that they had to find a conspiracy during a substantial part of the limitations period.

Now, I say all that because I don't think I am going to discuss it in an opinion but I just want you to recall that that particular thing came to pass in that particular way, and it does seem to me on its trivial level to be a meaningful review of how we got to be where we were, and I don't know whether it had the incidental result of misleading the jury—I hope it did not—but now I relieve myself of that thought for the day.

CONCLUSION

For the reasons stated in the petition and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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